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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHANTELLE MUNIZ,

Defendant and Appellant.

D074097

(Super. Ct. No. SCD274669)

APPEAL from a judgment of the Superior Court of San Diego County, Polly H. Shamoon, Judge. Affirmed.

Leslie A. Rose, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette C. Cavalier, and Elizabeth M. Kuchar, Deputy Attorneys General, for Plaintiff and Respondent.

Chantelle Muniz pleaded guilty to unlawfully taking and driving a vehicle (Veh. Code, § 10851, subd. (a)) and misdemeanor battery on a peace officer (Pen. Code, § 243, subd. (b)).<sup>1</sup> The trial court placed her on three years of formal probation and, as a condition of probation, imposed a Fourth Amendment waiver (condition 6(n)), including the requirement that Muniz submit her "computers[] and recordable media including electronic devices to search at any time with or without a warrant, and with or without reasonable cause, when required by [a probation officer] or law enforcement officer."

Muniz appeals, contending the condition requiring her to submit her electronic devices to warrantless search is unreasonable and unconstitutionally overbroad. We conclude, under the circumstances of this case, the challenged condition is reasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) and not facially unconstitutional. We therefore affirm.

## BACKGROUND

We draw our facts from the charging document, the plea agreement, and the probation report. A Toyota 4Runner was stolen from its parking spot sometime between November 13 and November 15, 2017. On November 25, officers responded to reports that Muniz was causing a disturbance. Dispatch notified officers she was driving the stolen 4Runner. A witness had seen the vehicle parked on the street. Later, the witness saw the vehicle backed into a residential driveway. The witness saw Muniz exit the vehicle; Muniz " 'started acting crazy while rambling.' " The witness said Muniz threw

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<sup>1</sup> Unless otherwise specified, further statutory references are to the Penal Code.

things into the street and tried to set things on fire. Responding officers located Muniz inside the 4Runner, underneath the dashboard area. Officers ordered her out of the vehicle and placed her into handcuffs. Once handcuffed, Muniz kicked one of the officers in the groin. She claimed the vehicle was hers and admitted to driving it around. She also admitted to burning electrical wiring in the vehicle in an attempt to re-start or repair it.

Muniz was charged with unlawfully taking and driving a vehicle (Veh. Code, § 10851, subd. (a), count 1), receiving a stolen vehicle (Veh. Code, § 496d, count 2), and misdemeanor battery on a peace officer (Pen. Code, § 243, subd. (b), count 3). She pleaded guilty to counts 1 and 3 and provided the following factual basis for the plea: "I took the vehicle of another without their consent with the intent to permanently deprive the owner of the use of the vehicle. I committed a battery on a police officer. [The] value [of the vehicle was] over \$950."

Muniz met with a probation officer who prepared a sentencing report. The probation officer observed that Muniz was polite and cooperative during the probation interview, but further observed she "clearly has an issue with controlled substances." Muniz started using marijuana around age 16; began drinking alcohol on a daily basis around age 19; began using cocaine and heroin around age 20; and began using methamphetamine around age 23, first occasionally, but later on a daily basis. She enrolled in a residential treatment program in 2017 but left after only one week.

Muniz admitted she was under the influence of methamphetamine when she took the 4Runner. She claimed she found it on the street with the windows rolled down and

believed it was abandoned. She had it in her possession only about one day and was using it to move her possessions out of her old residence. She admitted she had been using methamphetamine on a daily basis around the time of the offense and stated she " 'was out of [her] mind' " when she took the vehicle. She also admitted to kicking the arresting officer. She blamed her behavior on being under the influence of methamphetamine.<sup>2</sup>

The probation officer observed that this was Muniz's fifth criminal case as an adult, and the cases involved increasing seriousness: Muniz had three arrests and convictions for driving under the influence, a charge for possession of methamphetamine, and was on probation when she was arrested for the current offense. The probation officer remarked that her performance on probation was poor.

The probation officer recommended that Muniz be granted probation subject to general conditions as well as drug and alcohol conditions. The probation officer also recommended a Fourth Amendment waiver extending to electronic devices as a probation condition:

"[T]o aid the defendant's rehabilitation and ensure appropriate supervision in the community, the defendant shall obtain Probation's approval as to her residence if safe access or entry is denied to conduct [F]ourth waiver searches. In addition, it is recommended the [F]ourth waiver extend to any electronic devices. This is a tool, which is necessary to supervise the defendant and is reasonably related to prevent any future criminality."

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<sup>2</sup> Personal property belonging to the 4Runner's owner was missing from the vehicle when it was recovered; however, Muniz claimed that property had already been removed from the vehicle when she took it.

At sentencing, Muniz's counsel objected to imposition of the proposed electronic search condition on *Lent* grounds:

"As to 6(n), the search condition, I would object to recordable media including electronic devices. And that's pursuant to *People v. Lent*. I don't believe there's a nexus in this case for electronic media or recording devices. [¶] This was a vehicle theft. None of her prior convictions involve any electronic media or recordable media. So I don't believe there's a nexus there. [¶] I don't believe any of the other two *Lent* factors are met, either. I think they would just be general conditions, I think is what probation said for their supervision, which I don't believe satisfies *Lent*."

In response, the probation officer argued that an electronic search condition would aid probation officers in monitoring Muniz's compliance with probation conditions:

"Probation would ask that 6(n) be—include electronic devices. We believe we will need to monitor the defendant's devices to ensure her compliance with substance abuse conditions, as she was using that at the time she committed this offense, blamed the offense on methamphetamine, and has a history of using controlled substances. [¶] Generally, people do obtain controlled substances through electronic devices. She's also involved in a vehicle theft. And people do also sell stolen property via electronic devices quite frequently. We believe that those are necessary terms of probation."

The court agreed the Fourth Amendment waiver should extend to electronic devices:

"The defendant, in addition to having three DUIs at only [27] years old, has had a problem with methamphetamine, cocaine, and heroin. In fact, in this case she was under the influence of methamphetamine by her own admission. And as she has an arrest from June 23rd of 2017 for methamphetamine possession, clearly drugs have negatively affected her, and she has so far not complied with treatment and, in fact, left treatment. [¶] And since residential treatment is going to be mandated in this case, not only does the Court want to make sure she's going to residential treatment, but we want to make sure she's not using, possessing, or obtaining drugs."

And therefore, the electronic communication devices are going to be part of this Fourth waiver."

The trial court placed Muniz on three years of formal probation and imposed various terms and conditions, including an electronic search condition, a residential treatment program, and 365 days in local custody. The court awarded Muniz 357 days of presentence custody credit.

## DISCUSSION

### I

#### *The Electronic Search Condition Imposed Here Is Reasonable*

Muniz contends the electronic search condition is unreasonable under *Lent*. We review the reasonableness of probation conditions for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) "That is, a reviewing court will disturb the trial court's decision to impose a particular condition of probation only if, under all the circumstances, that choice is arbitrary and capricious and is wholly unreasonable." (*People v. Moran* (2016) 1 Cal.5th 398, 403 (*Moran*).)

"When an offender chooses probation, thereby avoiding incarceration, state law authorizes the sentencing court to impose conditions on such release that are 'fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer.' (§ 1203.1, subd. (j).) Accordingly, [our Supreme Court has] recognized a sentencing court has 'broad discretion to impose conditions to foster rehabilitation and to protect public safety

pursuant to . . . section 1203.1.' [Citation.] But such discretion is not unlimited: '[A] condition of probation must serve a purpose specified in the statute,' and conditions regulating noncriminal conduct must be ' "reasonably related to the crime of which the defendant was convicted or to future criminality." ' [Citation.] 'If the defendant finds the conditions of probation more onerous than the sentence he would otherwise face, he may refuse probation' [citation] and simply 'choose to serve the sentence' [citation].'' (*Moran, supra*, 1 Cal.5th at pp. 402-403.)

"Generally, '[a] condition of probation will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . ." [Citation.]' [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*Olguin, supra*, 45 Cal.4th at pp. 379-380; see *Lent, supra*, 15 Cal.3d at p. 486.)

Here, the Attorney General concedes the electronic search condition has no relationship to Muniz's convictions and involves conduct that is not itself criminal, but the Attorney General argues the condition is valid under the third *Lent* prong because it provides a necessary tool for effective supervision and is reasonably related to preventing

future criminality based on Muniz's history of alcohol and drug abuse. Under the circumstances of this case, we agree.

Search conditions are generally permissible under the third *Lent* prong because they deter future criminality and allow for more effective supervision of probationers. "For example, probation conditions authorizing searches 'aid in deterring further offenses . . . and in monitoring compliance with the terms of probation. [Citations.] By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers.' [Citation.] A condition of probation that enables a probation officer to supervise his or her charges effectively is, therefore, 'reasonably related to future criminality.' " (*Olguin, supra*, 45 Cal.4th at pp. 380-381.)

Whether *electronic* search conditions are reasonable under the third *Lent* prong is an issue currently pending before the Supreme Court. (See, e.g., *People v. Trujillo* (2017) 15 Cal.App.5th 574, review granted Nov. 29, 2017, S244650 (*Trujillo*); *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923.) Pending further guidance from the Supreme Court, and recognizing that other courts have reached different conclusions, we will adhere to this court's recent discussion of the third prong in *Trujillo*, which affirmed imposition of an electronic search condition under similar circumstances.

*Trujillo* explained that the reasonableness of an electronic search condition, under the third *Lent* prong, will depend on the particular facts surrounding the crime at issue and the defendant's history. "The primary focus of *Lent*'s third-prong jurisprudence has



been on the particular facts and circumstances of the case before the court, rather than on establishing bright-line rules. [Citations.] This makes sense given that the appropriateness of a particular probation condition necessarily depends on a myriad of tangible and intangible factors before the trial court, including the defendant's particular crime, criminal background, and future prospects. It is for the trial court, with the assistance of the probation officer and other experts, to determine the probation conditions that will permit effective supervision of the probationer." (*Trujillo, supra*, 15 Cal.App.5th at p. 584, review granted.)

In affirming the electronic search condition at issue in that appeal, *Trujillo* emphasized the particular facts in the record that supported the need for intensive monitoring while the defendant was on probation, including significant untreated alcohol abuse. (*Trujillo, supra*, 15 Cal.App.5th at p. 583, review granted.) Similarly, *In re J.E.* (2016) 1 Cal.App.5th 795, 801, review granted October 12, 2016, S236628 (*J.E.*), held that a minor's need for intensive monitoring, including for compliance with various drug-related probation conditions, justified an electronic search condition.

Like the defendants in *Trujillo* and *J.E.*, Muniz had an untreated substance abuse problem. She also had several prior convictions and had already performed poorly on probation. These circumstances support the trial court's exercise of its discretion to impose an electronic search condition. The court reasonably determined that Muniz's history and present circumstances required the intensive monitoring that an electronic search condition would provide. (See *Trujillo, supra*, 15 Cal.App.5th at p. 584, review granted ["The trial court had a reasonable basis to conclude the most effective

way to confirm Trujillo remains law abiding is to permit his electronic devices to be examined, rather than relying on a meeting or a telephone conversation."]; *J.E., supra*, 1 Cal.App.5th at p. 801, review granted ["In light of this record, it was within the juvenile court's discretion to impose the search condition as a means of effectively supervising Minor for his compliance with his drug conditions, as well as the rest of his undisputed probation conditions."].) Muniz's claim that her circumstances are insufficient to justify an electronic search condition is unpersuasive.

Muniz's reliance on *People v. Bryant* (2017) 10 Cal.App.5th 396, review granted, June 28, 2017, S241937 (*Bryant*) is misplaced. In that case, the defendant was convicted of possessing a concealed weapon in a vehicle. (*Id.* at p. 399.) The defendant apparently had no record of prior criminality, and there were no allegations of substance abuse.<sup>3</sup> The Court of Appeal observed that there was no electronic device involved in the crime, there was no evidence that defendant would use an electronic device to engage in future criminal activity, and there was no showing as to how the search condition would reasonably prevent any future crime or aid in the defendant's rehabilitation. (*Id.* at p. 404.) The court concluded the electronic search condition was not reasonable where there was no showing of any connection between the defendant's use of an electronic device and his past or future criminality. (*Id.* at pp. 404-406.) In contrast, here, Muniz demonstrated a significant history of substance abuse, with three DUI convictions and a

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<sup>3</sup> It appears the weapon was located during a search for marijuana that ensued after officers observed defendant and his girlfriend smoking marijuana in the car. (*Bryant, supra*, 10 Cal.App.5th at p. 399, review granted.) However, defendant was not convicted on any drug-related charges. (*Ibid.*)

charge for possession of methamphetamine. She admitted that she was under the influence of methamphetamine when she committed the instant offenses involving the stolen vehicle and battery on a peace officer. The probation officer indicated that offenders frequently use electronic devices to obtain drugs and to sell stolen property. The probation report opined the condition was necessary to supervise Muniz and was reasonably related to preventing her future criminality. Unlike in *Bryant*, the record here supports the finding of a connection between Muniz's use of an electronic device, her substance abuse, and her criminality.

## II

### *The Electronic Search Condition Is Not Unconstitutionally Overbroad*

Muniz alternatively argues the electronic search condition is unconstitutionally overbroad. The Attorney General argues Muniz's constitutional argument amounts to an as-applied challenge that was forfeited by counsel's failure to object on constitutional grounds in the trial court. "In general, the forfeiture rule applies in the context of sentencing as in other areas of criminal law." (*In re Sheena K.* (2007) 40 Cal.4th 875, 881 (*Sheena K.*)). Even constitutional challenges are forfeited unless they constitute a facial challenge, i.e., "a challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court[.]" (*Id.* at p. 887; see *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1345 (*Pirali*) ["A Court of Appeal may review the constitutionality of a probation condition, even when it has not been

challenged in the trial court, if the question can be resolved as a matter of law without reference to the sentencing record."].)

Muniz claims that counsel's failure to object did not forfeit her claim, and as such appears to characterize her claim as a facial constitutional challenge. To the extent Muniz asserts a facial overbreadth challenge to the electronic search condition, we reject it.

The facial constitutionality of a probation condition is subject to de novo review. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153; see also *Sheena K.*, *supra*, 40 Cal.4th at p. 890.) The state has an interest in the close supervision of probationers to further their rehabilitation and protect public safety. (*Olguin*, *supra*, 45 Cal.4th at p. 378.) Because the state has an obligation to monitor a broad range of probationers with varying needs of supervision, there are numerous circumstances in which courts may validly impose the type of electronic search condition challenged here. (See *Trujillo*, *supra*, 15 Cal.App.5th 574, review granted; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210; *J.E.*, *supra*, 1 Cal.App.5th

795, review granted; *People v. Ebertowski* (2014) 228 Cal.App.4th 1170.)<sup>4</sup> We therefore cannot say that a probation condition allowing the search of a probationer's computers and recordable media is not sufficiently narrowly tailored to the state's legitimate interest in reformation and rehabilitation of probationers in all possible applications. (See *Pirali, supra*, 217 Cal.App.4th at p. 1347 ["[a]lthough a probation condition may be overbroad when considered in light of all the facts, only those constitutional challenges presenting a pure question of law may be raised for the first time on appeal"].)

Muniz relies on the United States Supreme Court's decision in *Riley v. California* (2014) \_\_ U.S. \_\_ [134 S.Ct. 2473], which held a warrant is generally required prior to the search of a cell phone incident to arrest, as well as *Appleton, supra*, 245 Cal.App.4th 717, which, guided in part by *Riley*, struck a probation condition subjecting defendant's electronic devices to search. However, *Riley* involved an arrestee, not a probationer who has a significantly different expectation of privacy. (See *United States v. Knights* (2001) 534 U.S. 112, 119 ["Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled." ' "]; see also *J.E., supra*, 1 Cal.App.5th at p. 804, review granted ["*Riley*, however, did not involve probation conditions and, as a result, is inapposite in this context."].) As this court previously held

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<sup>4</sup> We acknowledge that courts are split on the constitutionality of broad electronic search conditions like the one imposed here. (Compare *People v. Appleton* (2016) 245 Cal.App.4th 717, 724-727 (*Appleton*) [striking an electronic search condition as unconstitutionally overbroad] with *J.E., supra*, 1 Cal.App.5th at pp. 803-807, review granted [rejecting the argument that an electronic search condition was unconstitutionally overbroad].) Pending further guidance from our Supreme Court, we adhere to this court's opinion in *Trujillo, supra*, 15 Cal.App.5th at page 587, review granted, which rejected a defendant's constitutional challenge under similar circumstances.

in *Trujillo*, "although computers and cell phones can contain highly personal information, the overbreadth analysis is materially different from the warrant requirement at issue in *Riley*." (*Trujillo, supra*, 15 Cal.App.5th at p. 587, review granted.) Pending further guidance from our Supreme Court, we continue to adhere to the analysis in *Trujillo* and accordingly reject Muniz's claim that the challenged probation condition is facially unconstitutional.

Muniz also contends the electronic search condition as imposed is unconstitutionally overbroad because it is "limitless" and not narrowly tailored to prevent Muniz from engaging in future criminality; however, she does not specify what limitations would be necessary.<sup>5</sup> To the extent Muniz presents an as-applied challenge to the constitutionality of the probation condition (i.e., dependent on the facts and circumstances of her case), we find that she forfeited this argument by failing to object in the trial court.

In the trial court, Muniz objected to the electronic search condition only on the ground that it was unreasonable under *Lent*. This objection was insufficient to preserve her as-applied constitutional argument because the two challenges implicate different

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<sup>5</sup> In her reply brief, Muniz explains the condition should be limited "to specific areas related to Ms. Muniz's electronic media, if any, which the probation department conceivably could be justified in monitoring," and further contends the condition should be restricted to protect the privacy rights of third parties (including Muniz's friends, family, associates, and acquaintances). Muniz did not raise these issues in the trial court (or in her opening brief) and has therefore forfeited the argument on appeal. (*Sheena K., supra*, 40 Cal.4th at p. 885.) Muniz's claim also fails because she lacks standing to bring a constitutional claim for any potential or speculative impact on the constitutional rights of third parties. (*In re Q.R.* (2017) 7 Cal.App.5th 1231, 1237, review granted Apr. 12, 2017, S240222.)

principles. A *Lent* challenge, as we have discussed, focuses on the reasonableness of the condition in light of the purposes of probation. An overbreadth challenge focuses on the closeness of the fit between the legitimate purpose of the condition and the burden it imposes on the defendant's constitutional rights. By failing to object on overbreadth grounds, Muniz did not afford the trial court the opportunity to consider the potential burden on Muniz's constitutional rights and no record on that issue was developed. The record is silent, for example, on the number and type of electronic devices that would be subject to the condition, what Muniz stores on those devices, and how she uses them. Muniz therefore forfeited her as-applied constitutional argument by failing to object in the trial court. (See *People v. Smith* (2017) 8 Cal.App.5th 977, 987; *In re R.S.* (2017) 11 Cal.App.5th 239, 247, review granted July 26, 2017, S242387.)

DISPOSITION

The judgment is affirmed.

GUERRERO, J.

I CONCUR:

HUFFMAN, Acting P. J.

I CONCUR IN THE RESULT:

AARON, J.